SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 341 MISC.

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HAROLD B. WILLEY, Clerk

HAROLD ROLAND CHRISTOFFEL,

Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Motion for leave to Proceed in Forum Pauperis

The petitioner moves for leave to file the attached petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit without prepayment of costs, and to proceed in forma pauperis. In support of this motion and as the grounds therefor, there is attached hereto the affidavit of the petitioner.

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David Rein

Arthur Kinoy

Attorneys for Petitioner

In the

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HAROLD ROLAND CHRISTOFFEL,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

HAROLD ROLAND CHRISTOFFEL, the petitioner herein, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, made September 18, 1952 (R. 1715), affirming the judgment of conviction of the petitioner (R. 1605).

Opinions Below

The opinion of the Court of Appeals affirming the judgment of conviction is not yet reported (R. 1700). The opinion of the Court of Appeals denying the petition for rehearing, two judges therein recommending that the reviewing authority of the Supreme Court be invoked, is not yet reported (R. 1711).

Jurisdiction

The judgment of the Court of Appeals was entered on September 18, 1952. A petition for rehearing was denied on November 29, 1952, by that Court, two judges recommending that the reviewing authority of this Court be invoked (R. 111).

An order was signed by the Chief Justice extending the time for filing this petition for writ of certiorari to and including January 17th, 1952, ~~(R.)~~. The jurisdiction of this C ourt is invoked under 28 U.S.C. Section 1254.

Summary Statement of Matter Involved

Proceedings Below

On March 1, 1947 petitioner, an officer of a local trade union in Milwaukee, Wisconsin, appeared as a witness before the Committee on Education and Labor of the House of Representatives, then conducting hearings on proposed amendments to the National Labor Relations Act. In the course of these proceedings the petitioner was asked a series of questions directed to his political affiliations and associations. As a result of his answers to these questions he was indicted on six counts for perjury under Title 22, Section 2501, of the District of Columbia Code (R. 1549) and after a trial by jury was convicted and sentenced to imprisonment of two to six years on each count, the sentences to run concurrently, ~~(R.)~~. The Court of Appeals affirmed the conviction, 171 F2d 1004 and this Court, after granting certiorari to review its validity, 336 U.S. 934, reversed the judgment of conviction, holding that the failure of the Government to prove at the trial the presence of a quorum of the Committee at the time the offense was committed deprived the petitioner of a fundamental right vitiating the judgment of conviction. 338 U.S. 84.*

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*/ The first trial court charged the jury that if the Committee session commenced with a quorum of thirteen members present, the Committee was a "competent tribunal" even if thereafter either at the time of swearing of the witness or the alleged perjurious answers, an actual quorum was not present.

On retrial the petitioner was convicted after a trial by jury and resentenced to imprisonment of two to six years on each count, the sentences to run concurrently (R./665).

On April 6, 1950 the Court of Appeals admitted petitioner to bail on the ground that substantial questions of law were involved. Thereafter the Court of Appeals sua sponte allowed the filing of an appeal, although the then counsel to petitioner had allowed the time to lapse to file the record on appeal on the ground inter alia that the appeal presented substantial questions. ~~On~~ Thereafter argument was held before the Court of Appeals. Subsequent to argument, present counsel were substituted as attorneys for the petitioner. On November 27, 1951 after argument the Court of Appeals sua sponte filed an order directing the government to file a supplementary memorandum addressed to certain basic inconsistencies in its theory of the case and granting petitioner opportunity to respond. ~~(R.)~~.

On April 2, 1952 the Court of Appeals en banc entered an order sua sponte setting down petitioner's appeal for rehearing en banc. ~~(R.)~~. On May 3, 1952 an order was entered setting the rehearing en banc for May 26, 1952. On that day the Court of Appeals orally revoked the order setting the appeal for rehearing en banc, and granted a motion of the Government to file an entirely new brief on the grounds inter alia that new government counsel were assigned to the case. Petitioner was permitted to file a reply brief. On September 18, 1952 the original panel of the Court of Appeals filed an opinion affirming the judgment of conviction. On October 3, 1952, petitioner filed a petition for rehearing. Shortly thereafter the Court of Appeals sua sponte entered an order directing the Government to respond to certain points raised in the petition for rehearing. ~~(R.)~~. On November 28, 1952, the Court of Appeals filed an opinion denying the petition for rehearing, reflecting the continued presence of doubt in the minds of two judges of the three-judge panel and their consequent conclusion that,

> "the reviewing authority of the Supreme Court might well be invoked for further consideration of the case" (R./742).

The Chief Justice extended the time for filing the petition for certiorari to and including January 17, 1952.

Statement of Facts

I. The alleged perjurious answers.

The petitioner was an officer of a local trade union in Milwaukee, Wisconsin. On March 1, 1947 he appeared as a witness before the Committee on Education and Labor of the House of Representatives, at a hearing on proposed amendments to the National Labor Relations Act. In the course of the hearing petitioner was asked a series of questions directed to his political affiliations and associations. In his answers he unequivocally denied that he was a communist or that he endorsed, supported or participated in communist activities. As a result of these answers he was indicted for perjury under Title 22, Section 2501 of the District of Columbia Code.

Former counsel for petitioner failed to raise in his brief on appeal any question as to the sufficiency of the evidence to support a finding that the testimony was in fact false. New counsel for petitioner after an examination of the record and the relevant law became convinced that serious questions as to the sufficiency of the evidence exist and that there is grave doubt as to both the competency and credibility of the evidence as to the alleged perjury under the rules most recently enunciated by the courts in matters of this nature. Compare Remington v. U.S. 191 F.2d 246, cert denied 343 U.S. 907. However the Court of Appeals has not permitted argument on this issue by petitioner's new counsel and the question is thus not presently before this Court, except insofar as the refusal of the Court of Appeals to permit argument of this question presents a denial of petitioner's right to appeal and due process of law.

II. The presence of a quorum of the Committee at the time of swearing and testimony.

The presence of a quorum of the Committee at the time of swearing of the witness and at the time of the alleged perjurious answers is a material ingredient of the offense and must be proven by the prosecution beyond a reasonable doubt. This is the law of this case as established by the Court in Christoffel v. U.S., 338 U.S. 84, in reversing and remanding the original judgment of affirmance.*

The House Committee on Education and Labor consisted of 25 members. Thus the Government was required to prove beyond the question of a doubt the presence of thirteen or more Congressmen at the time of swearing and at the time of testimony.

The Government on retrial sought to meet this burden of proof by adducing evidence from thirteen Congressmen witnesses that they were in fact present at the crucial times. In addition the Court permitted the admission into evidence of the transcript of testimony of a then deceased Congressman, Mr. Owen, adduced at the first trial (Tr. 386).

The defense sought to prove the absence of the requisite number of Congressmen at the decisive times but was frustrated in this effort by rulings and theories of the trial court which deprived the petitioner of his constitutional right to a fair trial by jury on all the issues in violation of the mandate of this Court in remanding Christoffel v. U.S., 338 U.S. 84.

*/ The Government concedes the validity of this statement of law and as the Court below points out, this proposition is "in accord with the position of both appellant and Government in this Court..."

A. The Failure of the Trial Court to Enforce a Subpoena Duces Tecum Directing the Production of the Minutes Book of the Committee.

Immediately following the alleged perjurious testimony of the petitioner, the Committee held an executive session. The petitioner maintained that an examination of the Minutes Book of the Committee and in particular the minutes of that executive session would show that directly following the time of testimony substantially less than aquorum of the Committee was present. Under the Legislative Reorganization Act of 1946, Part 3, Section 133(b) records are required to be kept as to presence at executive committee sessions. Furthermore, it is conceded that such a Minutes Book of executive sessions was regularly maintained as a record of the House and was in fact in existence. A subpoena duces tecum was issued against Congressman Lesinski, Chairman of the Committee at the time of trial. The witness appeared without the Minutes Book. Congressman Lesinski presented to the Trial Court a resolution of the House (H. Res.460,Feb. 2, 1950) which stated that he was "authorized to appear in response to the subpoena duces tecum" but "shall not take with him the papers and records in said subpoena." He further explained to the court that the book was presently in the custody of the Clerk of the House, Mr. Ralph R. Roberts, although his own testimony a week earlier had indicated that the records in question were in his own custody in his office (Tr. pp.483-487). Following this initial refusal to produce the Minutes Book, the Trial Court stated:

> "Well, as the Court sees it, this is a case in which the House of Representatives should be peculiarly interested and, of course, I know that every member of that body wants to do full justice, and see that justice is accomplished, so I think I am safe in asking Mr. Lesinski if he will not cooperate with the Clerk of the House, and Mr. McCormack, and the Speaker, if necessary, to see that the records which are asked for might not be made a vailable." (Tr.pp.483-487)

A subpoena duces tecum was therefore served upon the Clerk of the House, Mr. Roberts. This witness appeared without the book. He stated that the issue was for the House, and that after bringing the matter to the attention of the Speaker, the House passed a resolution dated February 8, 1950, House

Resolution 465, 81st Congress, 2nd Session (1950), referring the matter to the Judiciary Committee. This resolution stated in part,

> "that by the privileges of the House no evidence of a documentary character under the control and in possession of the House of Representatives can, by mandate of process of the ordinary courts of justice, be taken from such control or possession."

After this continued refusal to produce the Minutes Book, the Trial Court stressed the urgency of the matter and directed the Clerk to advise the House that in the opinion of the Court the case could not proceed to a final determination until the records were produced, holding

> "The Court: Of course, this case cannot proceed to a conclusion until the House tells us whether we can have this important evidence. It is difficult to understand the reluctance when it is their own case.
>
> * * *
>
> "Well, I would like to ask the Clerk if he will communicate with the Chairman of the Committee on the Judiciary and advise him of the urgency of this matter, and you can say that in the opinion of the Court the case cannot proceed to a final determination until these records are produced. To not do so would be a denial of justice to this defendant. The Court cannot permit that to come about. Now it may be that I will have to adjourn this matter until the House takes some action, and for that reason I am very desirous that they will cooperate with us and dispose of this matter promptly" (Tr. pp.931-933). (Italics supplied.)

Moreover, the Government conceded the importance of the production of the evidence sought and advised the Court that it it was doing everything in its power to facilitate the production of the book (Tr. pp.950-951). The Trial Court concluded by ruling that the Minutes Book "must be here in the courtroom and available if it is needed" (Tr. p.951).

Having thus been informed by the Trial Court that unless the Minutes Book was produced the case could not proceed to final determination, the Clerk of the House returned to the stand with a final resolution of the House (House Resolution 469, 81st Congress, 2nd Session (1950)), declining to produce the Minutes Book. This resolution once again took the position that under the privileges of the House no evidence of a documentary nature under its control can be obtained without its permission by the

mandate or order of the ordinary courts of justice, and that the Clerk was not authorized to produce minutes and transcripts of executive sessions. However, for the first time, this being the fourth resolution of the House on the matter, the resolution made the following "whereas" clause:

> "Whereas nothing occurred of sufficient importance in the executive session of said Committee on Education and Labor on the afternoon of March 1, 1947, to justify the entry of a minute of said meeting and no minutes of said executive meeting were made; ***."

The resolution concluded by authorizing the Clerk to produce certified copies of public meetings but prohibiting the production of any executive session minutes. After producing this resolution the Clerk testified that he had made a "very hurried examination" of the minutes of the executive sessions as they appeared in the book and did not find the minutes of the executive session on March 1, 1947. On cross-examination he stated that he did not know whether or not there were any minutes of this executive session.

The trial judge thereafter concluded that he was powerless to force production of the Minutes Book (Tr. p.1164) but reserved to the defense the right to recall the witness "if in some manner they [the minutes] should appear." The trial judge further refused to order a mistrial or grant a motion for directed verdict despite the refusal of the House to permit the production of the Minutes Book, concededly material and relevant evidence essential for the defense of petitioner.

B. <u>The denial of petitioner's right to examine and adduce evidence on the issue of the presence of a quorum at the time of swearing.</u>

The Government attempted to adduce evidence that thirteen Congressmen were in fact present at the crucial times, Committee hearing resumed at 2:30 P.M. on March 1, 1947. Petitioner was sworn directly following the testimony of R.J.Thomas, the previous witness. The allegedly perjurious answers were given a few minutes before 5:00 P.M. An executive session of the Committee was held in the hearing room at 5:00 P.M.

The character of the Government's affirmative testimony on the question of quorum at the time of swearing and testimony highlights the importance of the issues raised by this petitioner. For example, while only fourteen Congressmen were present at the beginning of the session at 2:15 P.M., eleven Congressmen, less than a quorum, appear to have been present during certain of the testimony of Thomas, the preceding witness. Moreover, the evidence of the thirteen Congressmen produced by the Government raises additional questions. For example, Representative Hartley, Chairman of the Committee, testified that he was present when the petitioner was sworn and when he gave the alleged perjurious testimony. Government Exhibit 5 reveals, however, that when the Committee went into executive session at 5:00 P.M., a few moments after the petitioner concluded the testimony in question, Representative Hartley was not in the Chair. Representative Clair Hoffman was presiding (Tr. p.2100). Congressman Hartley admitted to testifying at the first trial that he left the room before the executive session took place (Tr. p. 186). Finally, Congressman Hartley testified that shortly after 5:00 o'clock he was in his hotel and received a telephone call from the counsel for the Committee asking whether the Committee should provide funds for the petitioner to remain in Washington over the weekend (Tr. pp. 198-199). And finally, although Congressman Hartley testified that he knew

> "...there was a quorum present because I made it a rule to see that there was a quorum present. It is on that that I base my answer" (Tr.p.175),

he later conceded that there were repeated instances to his knowledge when a quorum was not present (Tr. pp.1130-1140).

Another Congressman who testified was Representative John Lesinski. Congressman Lesinski testified that when Thomas, the witness immediately preceding Christoffel left the rostrum he accompanied Thomas out into a corridor and had a discussion with him there "for awhile" (Tr. p.343). The petitioner was sworn directly following Thomas' testimony. Representative Lesinski further testified that Congressman Hartley presided at the executive session at 5:00 o'clock (Tr. p.344). Hartley, however, admitted that he was not there at that time (Tr. p.186).

Representative Richard M. Nixon was another of the thirteen Congressional witnesses. He also testified that he left the rostrum when the prior witness Thomas left the room and had a conference with him (Tr. pp.280-281). Representative Nixon likewise did not recall any executive session although an executive session was held directly after the time of the alleged perjurious answers.

Representative Wint Smith stated that he might have left the room during Thomas' testimony (Tr. p.103), and further testified that Hartley was at the executive session (Tr. p.306) though, in fact, he was not, according to his own testimony.

Representative Ralph W. Gwinn could not recall any executive session (Tr. pp.260-261). The testimony of Representative John Kennedy on the question of his presence during the crucial times is not particularly clear. At 4:30 that afternoon Senator Langer's daughter was being married. The wedding took place at St. John's Church on the corner of 16th and 8th Street. Representative Kennedy testified that he remembered going to 16th Street and then stated that he probably went to the reception and not the wedding.

Petitioner throughout the proceeding sought to prove both on cross and direct examination that many of these Congressmen were in fact not present at the crucial times by adducing evidence as to their whereabouts directly preceding the moment of swearing. It should be noted that if petitioner could prove the absence of one of the thirteen witnesses at the crucial times, he would have prevailed. Thus petitioner sought to examine the Congressional witnesses as to their presence during the testimony of Thomas, the witness directly preceding petitioner before the Committee. Time and time again the trial court refused to permit any inquiry into the presence or absence of Congressmen directly preceding the time of swearing. We refer the Court to the appendix attached hereto which sets forth examples of the Trial Court's exclusionary rulings. The Trial Court refused to permit the adducing of this evidence upon the theory that the line of questioning was immaterial to the issues of the case. On the same assumption the Trial Court refused to permit a defense witness, Mrs. Israell, totestify on direct examination that one of the Congressmen left the hearing room in

the company of Mr. Thomas, the previous witness, although the admission of this testimony if believed would have proven the absence of a quorum at the time of swearing. The Trial Court sustained objections to this evidence again on the ground that it was immaterial to the main issue of quorum at the time of swearing.

The Court of Appeals held that these rulings of the Trial Court were clearly erroneous and that the excluded evidence and cross-examination "was pertinent and therefore not collateral" (R.1743). Nevertheless, the Court of Appeals refused to remand on the ground that the conceded error was not sufficiently prejudicial to warrant a new trial, although two of the three members of the Court admitted to remaining "doubts" on the issue, concluding their opinion denying the petition for rehearing as follows:

> "Our conclusion is that a new trial is not warranted. This resolution of our doubts does not entirely remove them from the minds of two of us, who believe that the reviewing authority of the Supreme Court might well be invoked for further consideration of the case" (R.1710).

C. <u>The admission into evidence by the Trial Court of the transcript of the testimony in the first trial of Congressman Owens.</u>

During the interval between the first and the second trials Congressman Thomas L. Owens, a member of the Eightieth Congress, died. The Government in its attempt to prove the presence of a quorum offered a transcript of the testimony Congressman Owens had given at the first trial. Counsel for the petitioner objected to the introduction of this transcript as a violation of petitioner's constitutional rights on the ground that the issues in the second trial were consequent to the decision of this Court entirely different than the issues in the first trial. In the first trial, at which Congressman Owens testified, the Trial Court ruled that any inquiries as to the presence of the members of the Committee at the time of swearing or time of testimony were immaterial. The trial judge stated at the commencement of the case

> "I have made my ruling, Mr. Rogge. I don't want to repeat this again, but I have said it twice, that where the quorum was present at 2:15 it constituted a legal committee of the House of Representatives, and it was a legally constituted committee prior to the

time this defendant was sworn and examined, and no suggestion was made of a lack of quorum during the business of this committee; this Court is holding it a legally constituted committee of the House, and the fact that members come in and out, some went out and returned, some went out and didn't return, as far as this Court is concerned is immaterial." 'The foregoing appears in the Transcript of the Trial below, at p.387.)

Congressman Owens took the stand after this ruling. Thus, by the ruling of the Court counsel was precluded from inquiring as to his presence at the time of swearing or the time of testimony, Nevertheless, over the strenuous objections of counsel, the Trial Court in the second trial permitted the introduction of this transcript.

Statutes Involved

1. Title 22, Sec. 2501 District of Columbia Code:

"Title 22, Sec. 2501 -- Perjury -- Subornation of perjury. Every person who, having taken an oath or affirmation before a competent Tribunal, officer or person, in any case in which the law authorized such oath or affirmation to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition or certificate by him subscribed is true, wilfully and contrary to such oath or affirmation states or subscribes any material matter which he does not believe to be true, shall be guilty of perjury; and any person convicted of perjury or subornation of perjury shall be punished by imprisonment in the penitentiary for not less than two nor more than ten years..."
(March 3, 1901, 31 Stat. 1 329, Ch. 854 § 856).

2. Title 18 U.S.C. § 1621:

"Perjury. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition or certificate by him subscribed, is true, wilfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years, or both." (June 25, 1948, c.645, 62 Stat. 773.)

Questions Presented

1. Whether the refusal of the trial court to enforce the subpoena *duces tecum* to the Clerk of the House of Representatives to produce the Committee Minutes Book violated the petitioner's constitutional right to compulsory process under the Sixth Amendment?

2. Whether the refusal of the House of Representatives to produce the Committee Minutes Book pursuant to the subpoena *duces tecum* required the trial court in the exercise of its constitutional responsibility for the trial of criminal cases to declare a mistrial or direct a verdict of acquittal?

3. Whether the exclusion of pertinent and material evidence by the trial court relating to the absence of a quorum at the time of swearing and time of testimony violated petitioner's constitutional right to a fair trial on all the issues and required a reversal of the judgment of conviction?

4. Whether the exclusion *in limine* of cross-examination on pertinent and material issues violates petitioner's fundamental right to cross-examination?

5. Whether the exclusion of pertinent and material evidence by the trial court relating to the absence of a quorum at the time of swearing and time of testimony violated the mandate of this Court in reversing petitioner's original conviction in *Christoffel* v. *United States* 338 US 84?

6. Whether the admission of the transcript of a deceased witness at the first trial violated petitioner's constitutional right to be confronted with the witnesses against him as guaranteed by the Sixth Amendment?

7. WWhether under the law of the case established by this Court in *Christoffel* v. *United States* 338 US 84 it was violative of petitioner's constitutional right for the lower court to hold that the issues in the first trial were identical with the issues of the second trial within the meaning of the deceased witness' exception to the hearsay rule?

8. Whether the petitioner could properly have been indicted for violation of the District of Columbia Criminal Code Title 22, Section 2501 when the offense charged was alleged perjurious testimony before a Congressional Committee punishable only under the Federal Criminal Code, 18 U.S.C. 1621?

Reasons For Granting The Writ

There are presented here for decision several fundamental questions involving the constitutional relationship between the legislative and judicial arms of the national Government, the administration of federal criminal law as well as important questions of substance relating to the construction and application of several amendments to the Constitution of the United States. These questions have been decided by the lower court in a way in conflict with the decisions of other circuit courts of appeal on the same matter. These questions have been decided in a way probably in conflict with the applicable decisions of this Court and in particular with the previous decision of this Court in reversing petitioner's first conviction.

I. The refusal of the trial court to enforce the subpoena duces tecum to produce the Committee Minutes Book violated petitioner's constitutional right to compulsory process under the Sixth Amendment and required the Trial Court to declare a mistrial or direct a verdict of acquittal.

Throughout the trial below the petitioner maintained that an examination of the Minutes Book of the House Committee and in particular the Minutes of the executive session held immediately following his testimony would prove that substantially less than a quorum of the Committee was present at that time. For a long period of time the House of Representatives refused to honor a subpoena duces tecum issued by the process of the Court to produce the Minutes Book in question. Four separate resolutions of the House emphatically stated the position of that body that it would not respond to the process of the Court and produce the Minutes Book or Minutes of an executive session. The Trial Court ruled that the production of this evidence was essential

to petitioner's defense and that the case could not proceed to final determination until the records were produced. In the face of this direction of the Court, the House of Representatives adamantly continued its refusal to produce the Minutes Book stating, however, for the first time in its fourth resolution that the Minutes Book contained no minutes of the executive session in question. In the face of this refusal to comply with the process of the court the trial judge concluded that he was powerless to further compel the production of the Minutes Book. He nevertheless refused to declare a mistrial or direct a verdict of acquittal for the defendant.

The Court of Appeals holds that the trial judge's conception of his power under the circumstances was erroneous. The Court of Appeals clearly sets forth the fundamental principles which govern the constitutional relationship between the legislature and the judiciary. The Court held,

> "The right of an accused by appropriate means to obtain evidence material to his defense is essential to the administration of the criminal law. A subpoena duces tecum to one who has custody of the evidence is an appropriate means. If such evidence is under the control of a department of government charged with the administration of those laws for whose violation the accused has been indicted, and its production is refused, or it is excluded, the courts, having responsibility under the Constitution for the trial of criminal cases, have held a conviction will not be permitted without the evidence."

The Court of Appeals specifically applies these principles to the House of Representatives.

> "Like principles should apply with regard to evidence in the custody of the House of Representatives. While the privilege of the House must be respected it might give rise to occasions when it would be necessary to forego conviction of crime because evidence is withheld. There is no doubt some discretion, to be carefully exercised so as not to invade the constitutional right of an accused to compulsory process. U.S. Const. Amend. VI;"

Under an application of this fundamental constitutional principle the Trial Court should have required the procuction of the evidence requested, or else should have directed a verdict of acquittal, or ordered a mistrial.

The Court of Appeals avoids the inevitable conclusion which flows from an equal application of the principle to this petitioner by holding that the record shows that the minutes of the executive session were in fact not in existence.

The trial judge did not proceed on any such theory. Although he believed that the production of the Minutes Book would be most important to the defense case, it appeared that he reluctantly arrived at the conclusion that he was powerless to force the Congressional hand. At no point did he rule that an adequate showing had been made that there were in fact no such minutes. It is significant in this respect that the trial judge after stating that "we have already obtained all that we may expect from the House of Representatives" stated to counsel: "Of course, if in some manner they should appear, I will allow you to recall the witness." The trial judge would not have made such a statement if he had been convinced upon the record that the minutes were in fact not in evidence. To the contrary, it was quite clear that he was convinced that he had no power to force the production of the Book from the House of Representatives.

The opinion of the Court of Appeals argues that petitioner made no effort to rebut evidence in the record tending to show that the minutes were not in existence. Thus the Court of Appeals states that petitioner made no effort "to throw light on the question either of their existence or of the number present at the meeting."

The record does not support such an assumption. The subpoena <u>duces tecum</u> called for the production of the <u>entire book</u>, not merely the minutes of the executive session. The Minutes Book in its <u>entirety</u> was highly relevant on either of two theories:

1) to prove that the minutes of the executive session demonstrated that less than a quorum of the Committee was present directly after the allegedly perjurious testimony, or,

2) to prove by its physical appearance, if the Book failed to show minutes of the executive session, that the records were removed or tampered with.

Thus, the production of the entire Minute Book was relevant to the main issue on either of these two hypotheses. If, in fact, the trial court was moved by the evidence to hold that no minutes were in existence, it should have enforced production of the entire book on petitioner's theory that its physical appearance might tend to show removal of the minutes in question.

We suggest, therefore, that the Court of Appeals misconceived the posture of the problem. There was no evidence in the record to the effect that the Minutes Book itself was not in existence. Petitioner demanded the production of the Minutes Book, among other reasons, in an attempt to rebut the Congressional statement to the effect that no minutes of the executive session were in existence. Under these circumstances, there was no logical reason for refusing to enforce the subpoena other than an erroneous interpretation of the governing law. The Court of Appeals has held that the Trial Court's conception of its power was in error. It should have, accordingly, applied the principle it enunciated and reversed the judgment of conviction.

A fair and impartial enforcement of this fundamental policy is particularly important in the present case. In this prosecution the House of Representatives stands in effect as the prosecuting arm of government seeking vindication for its legislative process.

The House of Representatives seeks redress for alleged perjurious responses in the course of a legislative inquiry. As the Trial Court itself commented: "...it is their own case". Yet that body itself seeking to punish the individual citizen refuses to permit this individual citizen access to records in its own possession which may be instrumental in establishing his innocence. It is in such a situation that the judiciary is required under the Constitution to affirm its independence and protect the individual citizen in his right to a fair trial under the law. See Edwards v. United States 312 US 473, 482; United States v. Grayson, 166 F. 2d 863, 870 (2nd Cir. 1948); United States v. Andolschek, 142 F. 2d 503, 506 (2nd Cir. 1944), opinions by Judge Learned Hand; United States v. Burr, 25 Fed. Cas. 30,

35 et seq., No. 14, 692d (C.C.D. Va. 1807); United States v. Schneiderman, 21 U.S.L. Week 2069 (S.D.Cal., July 23, 1952). Unless the proud words of judicial independence restated so eloquently by the Court of Appeals are to appear meaningless in their practical application, this Court should exercise its appellate review and grant the writ prayed for.

II. The exclusion of pertinent and material evidence relating to the issue of quorum violated petitioner's constitutional right to a fair trial by jury on all the issues.

Petitioner throughout the trial below sought to prove both on cross and direct examination that many of the Congressmen were in fact not present at the critical time by adducing evidence as to their presence directly preceding the moment of swearing. Time and again the trial court refused to permit the adducing of this evidence on the theory that it was immaterial to the issues of the case and a completely collateral line of inquiry.

The Court of Appeals held that these exclusionary rulings of the Trial Court were completely erroneous, and that as a matter of law that the excluded evidence was "pertinent and therefore not collateral". Instead of reversing the judgment of conviction, however, the lower court concluded that it was nevertheless within the discretion of the trial judge to exclude this evidence.

The opinion of the Court of Appeals results in the complete destruction of petitioner's right to a fair trial.

In its opinion the Court of Appeals concludes that although the excluded evidence was pertinent and material, the Trial Court, nevertheless, had discretion to exclude. This opinion is in direct conflict with the decisions of this Court as well as the Court of Appeals for the District of Columbia Circuit, and other Circuits.

The opinion of the Court of Appeals is in direct conflict with the decision of this court in Alford v. U.S., 282 U.S. 687. This decision requires a reversal in the present

proceeding. In Alford, this Court, by Mr. Justice Stone, reversed a judgment of conviction on the grounds of improper exclusion of cross-examination. The defense sought to question a prosecution witness as to where he lived. The purpose of the question was to show possible bias or prejudice. The evidence sought to be elicited by the question was thus in no way as directly pertinent and material to the central issues in the case as were the questions excluded in the present proceeding. Nevertheless, the Supreme Court held that it was prejudicial error to exclude the question. Mr. Justice Stone pointed out that the "discretion of the trial court" comes into play in determining "when the subject is exhausted" or to protect a witness from questions designed "merely to harass, annoy or humiliate him". No such questions are present in this appeal. We do not believe that anyone will seriously contend that the evidence excluded by the Trial Court on the grounds that it was immaterial was in fact excluded because the "subject was exhausted", or that the questions were designed to "harass", "annoy", or "humiliate" the witness. These conditions are simply not present in the record and we do not believe that anyone will argue that they are. The Alford case requires reversal of this conviction.

The governing case in the District of Columbia Circuit is Lindsey v. U.S., 77 U.D. App. D.C. 1, 133 F. 2d 368, 1942. An application of the rule in Lindsey is completely in conflict with the Court of Appeal's conclusion in the present app eal. In the Lindsey case the Court of Appeals in an opinion by Judge Stephens reversed and remanded a judgment of conviction on the ground inter alia that the trial judge had no discretion to reject pertinent and material evidence sought to be elicited on cross-examination. In Lindsey the Court carefully delineated the area of discretion available to a trial judge in curtailing cross examination:

> "It is often stated that the control of cross-examination is within the discretion of the trial judge, but it is only after a party has had an opportunity substantially to exercise the right of cross-examination that discretion becomes operative.

> "In respect of such things as needless protraction, conduct of an examination in a manner unfair to a witness, undue inquiry into collateral matters to test credibility, and the like, cross-examination is properly within the discretion of the trial judge, and there can be no reversal except for abuse. But the distinction between limitation of cross-examination in such respects and denial of the right of cross-examination is clear and well established."

The application of this rule to the record in this case required reversal by the Court of Appeals. The Court had already ruled that the evidence sought to be adduced was pertinent and material. The Court of Appeals did not hold that the attempts to adduce this pertinent and material evidence represented "needless protraction" or "conduct of an examination in a manner unfair to a witness" or "undue inquiry into collateral matters to test credibility". These are the issues which might justify an exercise of discretion. Here the Court of Appeals has openly conceded that questions left unanswered were not collateral but material and pertinent. The Lindsey case required not affirmance but reversal.

None of the cases relied upon in the opinion of the Court of Appeals support a judgment of affirmance of a conviction based upon the exclusion of pertinent and material matter.* We have been unable to find a single case in any Circuit which supports a judgment of conviction based upon the exclusion of matter held by the Court itself to be pertinent and material, admittedly not "exhausted", but severely curtailed. The decision of the Court of Appeals thus represents a wholly unprecedented departure from the normal rules governing the conduct of a fair trial.

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*/ In Collazo v. U.S., U.S. App. D.C., 196 F. 2d 573, cert. denied, 72 S. Ct. 1065 (1952), the evidence excluded was held to be "too remote" and hence not pertinent or material. Wright v. United States 87 U.S. App. D.C. 67, 183 F. 2d 821 (1950), involved matters "not pertinent to the case" as well as repetition of questions "particularly on matters affecting the witness' credibility".

The opinion of the Court of Appeals based its conclusion that the exclusion of pertinent and material evidence was not prejudicial upon the assumption that the record contains questions similar in part to those excluded by the Trial Court.

Conceding that a number of pertinent and material questions were excluded, the Court of Appeals nevertheless points to other places in the record where some similar questions were admitted, either by accident or for the limited purpose of testing credibility.

We do not read the opinion as contending that every excluded question was in fact permitted at another point in the proceeding. The record, of course, could not bear out such an assumption. The Court of Appeals does imply in its opinion that some of the excluded pertinent questions were answered at other points in the record.

Assuming, arguendo, the presence in the record of such evidence, we suggest that this can in no way cure the prejudicial harm caused by the admitted exclusion of pertinent and relevant questions. On at least twenty-six different occasions during the course of the trial, the trial judge specifically upheld the prosecution's objection to this evidence on the ground that it was immaterial to the issue of whether a quorum was in fact present at the crucial moments (Tr. pp. 189, 190-192, 200, 203, 207-208, 212, 219, 237, 238, 254-255, 256, 259, 299-301, 1164-1165, 1200-1202). Time and time again the trial judge reaffirmed his ruling that this evidence could not properly be considered in respect to the issue of the presence of a quorum. We affix to this petition as an appendix examples of the judge's rulings on this point. These rulings were made in open court in the presence of the jury. We suggest that no jury of twelve laymen could be fairly expected to consider such evidence in connection with the presence or absence of a quorum, in view of the judge's clear and constant rulings that such evidence was immaterial to the issue of quorum.

Under the law of this case, as acknowledged by the Court of Appeals, the evidence which the appellant sought to adduce in cross-examination and direct examination should have been considered by the jury in determining whether a quorum was in fact present. In the face of the conduct of the trial and the constant rulings of the Judge that this evidence was not to be so considered and was immaterial to the main issue, we are at a loss to understand how it can be held that this evidence was, nevertheless, fully and fairly presented to the jury.

This contention that the exclusion of evidence on cross-examination is harmless where similar material may have been admitted on other grounds was sharply rejected by the lower court in Lindsey v. U.S., supra. In the Lindsey case the government contended that the excluded question was in fact answered at another point in the record. The Court, in the opinion of Judge Stephens, held:

> "... It is true that the answer to the previous similar, though less specific question, technically remained in the record, but the action of the court, in my view, in effect told the jury that the answer to neither of the questions was material for their consideration." (at p. 372). (Emphasis added.)

If the ruling of Judge Stephens in the Lindsey case is still governing law in the District of Columbia Circuit, this conviction should have been reversed. As Judge Stephens held, the action of the trial court "in effect told the jury" that the answers which were permitted were not material for their consideration on the issue of the presence of quorum.

The fact of the matter is that the entire case below was tried on the theory that this evidence was collateral and

immaterial.* It was not excluded on any other ground. This was the clear understanding of the trial court; and it was the clear understanding of the prosecution. It continued to be the understanding of the government until one week before the reargument of this case on appeal. Under these circumstances, it would make a mockery out of the right to trial by jury to maintain that the jury nevertheless considered this evidence in its determination of whether a quorum was in fact present at the decisive moments. The petitioner's constitutional right to trial by jury requires that the jury pass on this material ingredient of the offense. In light of the conduct of the trial it is impossible to hold that the jury ever considered the evidence in question to be relevant to the issue of fact before them. The petitioner has thus been deprived of the right to have the jury consider all material and relevant evidence.

The prejudice suffered by petitioner in this respect is particularly striking. The prosecution had the burden of proving the presence of thirteen Congressmen at the crucial times. Each of the thirteen testified. If the jury had reasons to doubt the testimony of only one as to his presence, they would have been bound to find for the defendant. Limitation of pertinent and material cross-examination as to any one of the Congressmen could not be cured by allowing similar cross-examination as to any of the <u>others</u>. As long as petitioner was restricted in his efforts to disprove the presence of any <u>one</u> of the thirteen, he was deprived of his right to a fair and full consideration of all the evidence by the jury.

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*/ The most striking proof of the fact that the entire proceeding below was tried upon an erroneous theory of law to the prejudice of petitioner is found in the exclusion of testimony on <u>direct</u> examination of petitioner's witness, <u>Israell</u>. On direct examination, the petitioner sought to adduce evidence from the witness <u>Israell</u> to the effect that one of the Congressmen left the hearing room in the company of Mr. Thomas, the prior witness. The trial court sustained objections to this line of inquiry on the ground that it was immaterial to the main issue of the presence of a quorum at the time of swearing. The Court of Appeals has held that such an inquiry was both pertinent and material to the main issue. In respect to exclusion of evidence on <u>cross-examination</u>, the Court seems to find a cure for the prejudice in the existence of similar questions admitted on cross-examination for other purposes. No such explanation is possible for the exclusion of <u>direct</u> testimony. Certainly it was not within the "reasonable discretion" of the trial judge to exclude testimony on <u>direct</u> examination because the points sought to be elicited have been partially developed for <u>other purposes</u> in the cross-examination of hostile witnesses.

Deprivation of the right to a trial by jury is not a technical defect to be cured by a nunc pro tunc reconstruction of a trial record.

If the trial judge, the prosecution and the government, until one week before the original reargument on appeal was ordered, firmly believed that the questions which were excluded by the trial judge were immaterial to the main issue, the jury cannot have been expected to have fairly considered these questions in arriving at their determination of the facts. By combing the record to dredge out questions admitted on other grounds in order to cure admitted error of prejudice to the petitioner, the Court of Appeals has in effect denied this petitioner his most elementary constitutional right to a fair trial of all the issues on all the evidence by a jury of his peers.

It was on this question particularly that two of the three members of the Court of Appeals saw fit to express formally their continued doubts and to urge the invocation of the reviewing authority of this Court. Where doubt is present as to whether an individual American citizen has been deprived of his fundamental constitutional right to a full and fair trial by jury on all the issues, this Court should exercise its reviewing authority.

Under the rule of the Alford case, and in the spirit and letter of the constitutional guarantee of the Sixth Amendment, this Court should grant the petition for a writ of certiorari.

III. The admission into evidence of the transcript of the former testimony of Congressman Owens violated the petitioner's constitutional right to be confronted with the witnesses against him under the Sixth Amendment.

During the interval between the first and second trials, Congressman Thomas L. Owens died. The Government felt it essential to bolster its burden of proving quorum by introducing into the second trial the testimony Congressman Owens had given in the first trial.

Counsel for the petitioner strenuously objected to the introduction of this transcript as a violation of petitioner's constitutional rights. In its initial opinion affirming the judgment of conviction the Court of Appeals held that the admission of this transcript was permissible as an exception to the hearsay rule under the decision of this Court in Mattox v. United States, 156 U.S. 237. The Court of Appeals agreed with petitioner that the constitutional right of the accused, protected by the Sixth Amendment, to be "confronted with the witnesses against him," would be violated if the issue in the first trial was not the same as the issue in the second. The Court of Appeals, however, refused to reverse, holding that "opportunity to cross-examine, however, was open in the first trial and appellant did not seek to pursue it according to his own theory on the quorum issue." On petition for rehearing counsel for petitioner pointed out to the lower court that (1) the issues in the first trial were obviously not the issues in the second trial, since this Court had reversed and remanded precisely on the ground that the original Trial Court had misconceived the basic issues, and (2) that the petitioner's counsel in the first trial did not have an opportunity to cross-examine Congressman Owens on the issues which are now held to be decisive. (See Statement of Facts herein, PointC.)

In its opinion denying the petition for rehearing the Court of Appeals in effect now concedes that the admission of the transcript at the second trial violated petitioner's constitutional rights as enunciated by this Court in Mattox v. United States,

supra:

> "It is true as appellant contends that while the ultimate issue in the second trial was the same, they differed in theory as to when a quorum was essential. If the effect of this on possible cross-examination at the first trial did not permit the admission of the transcript at the second trial under the rule of Mattox v. U.S., 156 U.S. 237 (1895) referred to in our former opinion, we nevertheless adhere to the view, also there stated, that its admission was not prejudicial." (R. 1712)

The violation of a citizen's constitutional rights in a criminal trial in which his liberty is involved has never been deemed by this Court "harmless error." See Glasser v. United States, 315 U.S. 50, 67, 75. The Court of Appeals has thus virtually conceded that petitioner's constitutional rights were violated by the admission of this transcript. A conviction based in whole or in part upon the violation of a defendant's constitutional rights to a full and fair defense cannot stand. Glasser v. United States, supra.

Even if the admission of the Owens transcript were not a violation of petitioner's constitutional rights under the Sixth Amendment, we find it difficult to understand how it could be considered "harmless error." The Government had the strict burden of proving the presence of thirteen Congressmen. If the Owens transcript had been properly excluded, it is impossible to say that that would have had no effect upon the jury verdict since any doubt as to the presence of even one Congressman could have resulted in a judgment of acquittal.

IV. The petitioner was improperly and invalidly indicted for violation of the District of Columbia Criminal Code, Title 22, Section 2501, since the offense charged was alleged perjurious testimony before a Congressional Committee punishable only under the Federal Criminal Code, 18 U.S.C.1621.

Petitioner moved to dismiss the original indictment for violation of the District of Columbia Criminal Code on the ground that it was improper and invalid since theoffense charged, alleged perjurious testimony before a Congressional Committee, was punishable only under the Federal Criminal Code, 18 U.S.C. 1621. Although this point was decided adversely to the petitioner by the Court of Appeals in the first Christoffel case, 84 App.D.C. 132, 171 F. 2d 1004, this Court did not pass upon the question reversing and remanding solely on the issue of quorum. Christoffel v. United States, 338 U.S. 84. This issue is thus now directly before this Court for its consideration.

The opinion of the Court below sustaining the indictment is probably in conflict with the applicable decisions of this Court and in particular the opinion of this Court in Thomas v. Loney, 134 U.S. 372.

The District Code of the District of Columbia is a complete codification of the laws solely applicable to the District of Columbia. Sims v. Rives, 66 App.D.C.24, 84 F. 2d 871m cert. denied 298 U.S. 682.*

This Court has held that,

> "The power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the Government in whose tribunals that proceeding is had. It is essential to the impartial and effective administration of justice in the tribunals of the nation that witnesses should be able to testify freely before them unrestrained by legislation of the state or by fear of punishment in the state courts." Thomas v. Loney, supra.

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*/ Under the District of Columbia Code certain specified individuals are authorized to administer oaths. The District of Columbia does not authorize members of Congress to administer oaths in the District, although members of Congress are authorized to administer oaths in connection with their exclusive functions as legislators.

Furthermore, this Court has held that a witness who testifies in the course of an exclusively federal proceeding

> "is accountable for the truth of his testimony to the United States only and perjury committed in so testifying is an offense against the public justice of the United States..." Thomas v. Loney, supra.

See, also, Johnson v. United States, 225 U.S.405; United States v. Curtis, 107 U.S. 671; Caha v. United States, 152 U.S. 211.

Petitioner's alleged offense was testimony before a Committee of the House of Representatives. Under the applicable decisions of this Court, he could only have been indicted under theFederal perjury statute, 18 U.S.C. 1621. His indictment under the District of Columbia Criminal Code was, therefore, improper and invalid and should have been dismissed.*

CONCLUSION

In Christoffel v. United States, 338 U.S. 84, this Court reversed appellant's first judgment of conviction in order to guarantee his right to a fair trial on all the issues. The opinion of the Court below reflects the doubts of the sitting judges themselves as to whether petitioner's fundamental constitutional right to a fair trial by jury on all the issues was violated by the conviction below. Two of the three judges affirming the judgment of conviction have recommended that the reviewing authority of this Court might well be invoked. It is especially true in a proceeding in which the Congress of the United States is in a very real sense the prosecuting force that the fundamental constitutional rights of an individual citizen should be scrupulously guarded. This Court has stated:

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*/ It should be noted that the maximum penalty under the federal perjury statute is less than the penalty actually imposed in the instant case.

"In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused. But especially is this true where the scales of justice may be delicately poised between guilt and innocence." Glasser v. United States, supra.

In accord with this fundamental principle, the recommendations of the Court which affirmed the conviction that the reviewing authority of this Court should be invoked, and for the reasons stated herein, it is respectfully submitted that this petition for writ of certiorari should be be granted.

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APPENDIX

Examples of the trial court's rulings on exclusion of evidence and limitation of cross-examination.

By Mr. Rogge.

Q. Didn't I ask you on a previous occasion this question, and didn't you give me this answer: "Question: In other words, with reference to each of these witnesses, you had what amounted to, in effect, a roll call?" And you answered: "Answer: Yes, I think that might be a fair assumption."

Mr. Pratt: I object to this question as having nothing to do with the issues of this case.
The Court: Well, it only has to do with the credibility of the witness. (Tr. p.189)

* * * * * *

Q. And you admit that there was, in effect a roll call with reference to the witness Thomas, who just preceded Mr. Christoffel?

The Court: Yes, but now there wasn't any direct inquiry about Thomas.
Mr. Rogge: Well, if your Honor please, I would like to be heard on this.
The Court: The objection will be sustained.
Mr. Rogge: May I be heard on this, your Honor because it is---
The Court: No, except to stay within the direct examination.
Mr. Pratt: I object to it, if the Court please.
The Court: There wasn't any inquiry about Thomas.
Mr. Rogge: Your Honor, I don't like to impose on your Honor's ruling, but this is the witness that just preceded Mr. Christoffel. He says there was a certain number, and when Mr. Christoffel was on the stand. This was right before it, and I contend that they were not there then, and then I am going to this witness and saying, "Well, so and so wasn't present at a certain time." I mean, your honor is holding me down so that I cannot test him as to who was there and when Mr. Christoffel was there.
The Court: No, you can inquire about that.
Mr. Rogge: Yes, but I---
The Court: You cannot inquire who was there and when Christoffel was examined.
Mr. Rogg e: Yes, but I am entitled to inquire who was there just before, if your Honor please, because if they were not there just before then, they had to come in, and I don't think they did.
The Court: Yes. Well, I think that is getting afield. (Tr. p.191.)

* * * * * *

Q. Isn't it also true that in addition to not calling on Mr. Schwabe, you also didn't call on Mr. Gwinn or Mr. Smith during the time that Mr. Thomas was on the stand?

Mr. Pratt: To that I object, if the Court please. It is not relevant.
The Court: Objection sustained (Tr. p.203).

* * * * * *

Q. Do you recall this question by the Court, and this answer by you:

"The question that counsel now put is, do you doubt that at that time they called the witness" --namely, Thomas,-- "before the various members of this committee, that there was any more than ten members and the chairman there at that time?"

And giving this answer:

"It says on the record which I have before me, and I have little doubt but that they were the members identified in this record with the members who were present." (Referring to the ten and the Chairman.)

Mr. Pratt: I think the reference made by counsel is not an accurate one. That is what the witness was referring to, and I want to repeat my objection that this is beyond the range of the direct examination, and I object.
The Court: Objection sustained (Tr. pp.206-207).

* * * * * *

By Mr. Rogge.

Q. And didn't I also ask this question, and you gave me this answer--

Mr. Pratt: I object before he asks the question, if the Court please.
The Court: I will have to let him ask the question, but I told him that he should stay within the scope of the direct examination (Tr.p.208).

* * * * * *

By Mr. Rogge.

Q. Now, when you were present you either questioned or stated you had no questions, didn't you?

Mr. Pratt: I object.
The Court: On that afternoon?
Mr. Rogge: That is right.
The Witness: Will you state the question again there?
Mr. Rogge: Will the reporter read it? (Pending question read.)
Mr. Pratt: I object to that.
The Witness: I either questioned or I didn't question.
Mr. Pratt: Just a minute. I objected to this because this relates to the testimony of the previous witness, not to the testimony or the time when the testimony of the defendant was taken (Tr.pp.254-255).

* * * * * *

By Mr. Rogge.

Q. Isn't it true that during the questioning of Mr. Thomas you left the room?

Mr. Pratt: I object.
The Court: Objection sustained.
Mr. Rogge: May I be heard on this briefly at the bench, your Honor?
The Court: No, we are dealing with this defendant.

Mr. Rogge: I know, but if this man left the room then he has to come back here for Christoffel, and I am entitled to question him as to procedure, and thefollowing time, to test whether he was there when he says he was, if the Court please.
The Court: Objection sustained (Tr. p.259).

* * * * * *

Q. On this particular time of which we are speaking, this Saturday afternoon, the Chairman followed the practice of calling on the members in the order of seniority, didn't he?

Mr. Pratt: I object to this unless it is restricted to the time Christoffel was on the stand.
The Court: Sustained (Tr.p.299).

* * * * * *

Q. If the questioning went from McCowenn to Brehm, that would indicate you weren't there, wouldn't it?

Mr. Pratt: I object unless it relates to the time Mr. Christoffel was on the witness stand.
The Court: Sustained (Tr. p.300).

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HAROLD B. WILLEY, Clerk

No. 341 Misc.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

HAROLD ROLAND CHRISTOFFEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AND ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

Neither the opinion of the Court of Appeals affirming the judgment (R. 1700-1714) nor the opinion of the Court of Appeals denying a rehearing (R. 1741-1743) is yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1952 (R. 1715). The petition for rehearing was denied on November 29, 1952 (R. 1741). By order dated December 17, 1952, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including January 17, 1953. The petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the exclusion on certain occasions of evidence as to the presence or absence of a quorum of the House Committee on Education and Labor prior to the time petitioner was sworn and testified before the Committee was prejudicial, where the substance of the desired evidence was admitted on other occasions.

2. Whether the trial court properly denied petitioner's motion for a mistrial or a directed verdict of acquittal on the ground that the House of Representatives refused to produce the Minutes Book covering all executive sessions of the House Committee on Education and Labor during the 80th Congress, where it was shown that no minutes were made of the material executive session held on March 1, 1947.

3. Whether it was prejudicial error to admit in evidence at petitioner's second trial a transcript of the testimony given at the first trial by Congressman Owens, who had died in the interim, where the substance of Owens' testimony was also testified to at the second trial by four other congressmen.

4. Whether the giving of false testimony under oath before a congressional committee in the District of Columbia constituted a violation of the local District of Columbia perjury statute as distinguished from the federal perjury statute.

STATUTES INVOLVED

The federal perjury statutes (18 U.S.C. (1946 ed.) 231 and 232, Criminal Code, §§ 125, 126 (now 18 U.S.C. 1621 and 1622)), provided, as of the dates involved here:

> Sec. 231. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly,

> or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years.
>
> Sec. 232. Whoever shall procure another to commit any perjury is guilty of subornation of perjury, and punishable as in section 231 of this title prescribed.

The District of Columbia perjury statute (22 D.C. Code (1940), 2501) provides:

> Every person who, having taken an oath or affirmation before a competent tribunal, officer, or person, in any case in which the law authorized such oath or affirmation to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath or affirmation states or subscribes any material matter which he does not believe to be ture, shall be guilty of perjury; and any person convicted of perjury or subornation of perjury shall be punished by imprisonment in the penitentiary for not less than two nor more than ten years. Any such false testimony, declaration, deposition, or certificate given in the District of Columbia, but intended to be used in a judicial proceeding elsewhere, shall also be perjury within the meaning of this section.

STATEMENT

On September 3, 1947, a six-count indictment was filed in the District Court for the District of Columbia charging petitioner with the commission of various perjuries while testifying before the Committee on Education and Labor of the House of Representatives on March 1, 1947, in that he falsely denied that he was or had been a member of the Communist Party and falsely testified concerning certain other related matters, in violation of 22 D.C. Code (1940) 2501, supra (R. 1549-1555). Petitioner was found guilty on all counts[1/] and a general sentence of imprisonment

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1/ The court granted a judgment of acquittal as to the second count (R. 128).

for a period of two to six years was imposed. This judgment and sentence were ultimately reversed by this Court on the ground that it was error for the trial court to instruct the jury that the Committee was a competent tribunal within the meaning of Section 2501, supra, if a quorum of the Committee was present at the commencement of the Committee session and no point of absence of a quorum was subsequently made. Christoffel v. United States, 338 U.S. 84.

Petitioner was retried on the theory that the Government must prove the physical presence of a quorum of the Committee, i.e., thirteen members, both at the time petitioner took the oath and when he testified falsely (R. 1528, 1530). Petitioner was again convicted on all five counts (R. 1597) and sentenced to imprisonment for two to six years on each count, the sentences to run concurrently (R. 1605). The evidence, insofar as it is pertinent to the questions presented, is set forth in the Argument.

The judgment and sentence were unanimously affirmed by the Court of Appeals (R. 1700-1714), and a petition for a rehearing was denied (R. 1741-1743), after careful and thorough consideration of all the matters which petitioner here assigns as error.

ARGUMENT

1. Petitioner complains of certain rulings of the trial court as to the exclusion and admission of evidence sought to be adduced with respect to the factual issue of the presence of a quorum of the Committee at the time the oath was administered to him (Pet. 8-11, 19-25). The pertinent facts are as follows:

Petitioner was sworn and began his testimony to the Committee at about 4:00 p.m. on March 1, 1947. His testimony extended to 5:00 p.m. when the Committee went into executive session (R. 157, 172; Govt. Ex. 5,

pp. 2020, 2058, 2079, 2100). Thirteen members of the Committee each testified that he was present when petitioner was sworn and testified. (Hartley, R. 173-175; Hoffman, R. 409-422; McCowen, R. 443-446; Brehm, R. 348-350; Kersten, R. 263-266; Kearns, R. 307-310; Nixon, R. 275-277; Lesinski, R. 333-336; Fisher, R. 358-361; Kennedy, R. 375-378; Schwabe, R. 229-232; Gwinn, R. 248-251, Smith R. 294-296.) The testimony of a deceased member, Owens, given in the first trial, that he also was present, was admitted in evidence (R. 397). Moreover, four members of the Committee testified that they definitely remembered that Owens was present (R. 296, 310, 336, 361-362). Thus, the Government proved that fourteen members of the Committee, one more than a quorum, were physically present when petitioner was sworn and testified.

During approximately the two hours just prior to petitioner's testimony before the Committee, the Committee heard testimony by one R. J. Thomas (Govt. Ex. 5, pp. 2049-2078). The last hour consisted of questioning by the Committee members. The Chairman gave each member of the Committee an opportunity to question the witness, calling each in the order that the members were seated at the rostrum, first the Republicans on his right in the order of seniority, then the Democrats on his left (Govt. Ex. 5, pp. 2061-2078). During the Thomas testimony, three members who testified that they were present when petitioner was sworn and testified, Schwabe, Gwinn, and Smith, did not orally indicate their presence, either by questioning or by declining to question.

Petitioner's counsel claimed that this questioning procedure was in effect a roll call which showed that during the latter part of the witness Thomas' testimony, which just preceded petitioner's oath, a quorum was not present. Thus, in his opening statement, petitioner's counsel stated (R. 132, 133):

> Now, it was the regular procedure, and at this time the Republicans were in the majority, and Mr. Hartley was the chairman, and had a procedure which I think he will tell you he followed religiously, of calling upon all of the Republicans, which were to his right, in order of seniority, and then calling upon all the Democrats, which were to his left, in order of seniority, and I think he is going to tell you from the witness stand that there was this with each member, which was in effect a roll call, I think that is what he is going to tell you from this witness stand * * *
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> * * * on the witness who will precede, Mr. Thomas, there was one of these roll calls, one of these going -- around questions, and at that time the number had already dwindled so that there was no longer a quorum and, as we will show at that time there were only ten and the chairman, a total of eleven, and that is two less than a quorum.

When petitioner's counsel sought to adduce testimony from the chairman of the Committee, and other members of the Committee, with respect to this questioning procedure, and its use during the Thomas testimony, objections to some questions were sustained, on most occasions because they were thought to be beyond the scope of the direct testimony and on others because what transpired during the Thomas testimony was thought to be immaterial. Nevertheless, all the basic facts were brought out.

Thus, Congressman Hartley, the Chairman, admitted that he had testified at the first trial that based upon the transcript of the Committee proceedings, "apparently there were ten and myself at the time Mr. Thomas was questioned" (R. 184), that the questioning procedure during the Thomas testimony amounted to a roll call (R. 189, 206) and that he religiously followed a procedure of calling on all the members who were present for questioning in the order of seniority (R. 194, 205). He testified that the only Committee members who questioned Thomas were himself, Hoffman, McCowen, Brems, Kersten, Owens, Kearns, Nixon,

Lesinski, Fisher and Kennedy (R. 212) and that petitioner followed Mr. Thomas on the stand (R. 184, 191). He explained, however, that he did not necessarily call on all members who were present (R. 212), that it was not exactly true that the questioning procedure amounted to a roll call (R. 188-189) and that it was possible that Congressman Schwabe was there and he did not call on him (R. 201).

Congressman Schwabe, who was one of those not identified in the transcript of the Committee session as having questioned or declined to question the witness Thomas, testified that he was present when Thomas was questioned and that he remembered it very distinctly (R. 233, 235, 238). He also testified that the Committee had a regular "procedure of calling on the members who were there in the order of seniority, first those on the Republican side and then those on the Democratic side", but "I don't know that it was followed that afternoon absolutely" (R. 235), and "sometimes they would shake their head to the chairman and the answer was inaudible, and there was no record in that case" (R. 236).

Congressman Smith, another Committee member about whom the transcript was silent during the Thomas questioning, testified that he was present at that time and that he thought he passed (R. 299, 302-303). He also acknowledged the usual practice of calling on members in the order of their seniority "except when calling them out of order" (R. 300, 304). He also explained that "I was a new member and I didn't ask a lot of questions, and frequently the Chairman would look down toward us and I would simply wave my hand (indicating)" (R. 303).

Congressman Gwinn, the third Committee member who did not question Thomas, testified that he was present when Thomas was questioned and that he remembered "the examination of Mr. Thomas quite well" (R. 254).

In addition, both the chairman and Congressman Smith admitted that it was customary for Committee members, including themselves, to leave the committee room occasionally to talk to their secretaries, answer telephones, etc. (R. 215, 302-304).

Thus it is manifest, as the court below held (R. 1711-1712), that the substance of the testimony desired was indeed elicited from the witnesses (see opening statement of petitioner's counsel and offers of proof, R. 132, 133, 301-302, 1148-1151). Hence not only were the judge's rulings excluding certain testimony non-prejudicial because the substance of the same testimony was admitted on other occasions, but, as also held by the court below (R. 1712), the exclusionary rulings were within the court's discretion. The record discloses a lengthy and thorough cross-examination which adduced the substance of all the testimony desired. The factual issue of the presence of a quorum at the essential times was thoroughly probed, and the judge permitted a reasonable latitude of questioning as to the presence of a quorum at the earlier time in the committee session when Thomas was testifying. At the most, testimony as to the presence of a quorum during the Thomas testimony bore only indirectly on the factual issue in this case as to the presence of a quorum when petitioner was sworn and testified. The judge's rulings were therefore within the discretion residing in him to control the extent of cross-examination. Glasser v. United States, 315 U.S. 60, 83; Alford v. United States, 282 U.S. 687, 694; Collazo v. United States, 196 F. 2d 573, 584, certiorari denied, 343 U.S. 968; Wright v. United States, 183 F. 2d 821; Lindsey v. United States, 133 F. 2d 368.[2/]

2/ In this same connection, petitioner also contends that the exclusion of certain testimony tendered by petitioner through Mrs. Israell on direct testimony was prejudicial error (Pet. 10-11, 24). Mrs. Israell testified that she was present throughout the committee session and that only six members of the committee were present when petitioner was sworn and testified (R. 1198, 1202). She further said that the witness Thomas

(continue fn. on page 9)

Petitioner argues, as he did in the court below (R. 1743), that the trial judge by ruling on occasions that evidence concerning the presence of a quorum during the Thomas testimony was immaterial, conveyed the impression to the jury that all evidence concerning this matter was not to be considered by them. An examination of the entire record will show that no such impression was left with the jury. Indeed, on almost all occasions where reasons were given for the objection or for sustaining the objection to the question, it was that the question was beyond the scope of the direct examination (R. 190-192, 193, 204-205, 207-208, 211, 219). In this connection, at one point the judge stated that "I haven't any doubt but that you can prove those matters, but you cannot do it on cross-examination when it is not the subject of the direct examination" (R. 204).[3/] As we have pointed out, the judge did on other occasions let the evidence in, sometimes over the objection of the Government (R. 183-184, 187-189, 191, 194, 200-201, 205-206, 212, 217-218, 233-238, 253-256, 299, 303).

Some evidence apparently was excluded as irrelevant or immaterial, but there was never any discussion of the matter in the presence of the jury which might have led them to believe that the same or similar evidence where admitted could not be considered by

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2/ (fn. continued) left the committee room at the conclusion of his testimony. An objection was then sustained to the question as to whether anyone left with him. We agree with the court below that the proper question was whether any member of the Committee left with Mr. Thomas (R. 1742). In any event, it is clear that the exclusion was not prejudicial, for if the jury gave any credence to Mrs. Israell's testimony, it could not have found that a quorum was present at the essential times.

3/ It is true that when the evidence was subsequently offered on direct, it was excluded. But this was done outside the presence of the jury, and the ground for the exclusion does not appear (R. 1148-1151).

them in deciding the factual issue of the presence of a quorum. Certainly the court's very admission of the other evidence conveyed the idea to the jury that they could consider it, and there was nothing in the court's instructions which in any way limited the application of any evidence adduced.

We submit therefore that there was no prejudicial exclusion of evidence.

2. Petitioner also contends that the trial court should have granted a mistrial or directed a verdict of acquittal because the House of Representatives refused to produce the minutes of all executive sessions of the Committee on Education and Labor during the 80th Congress (Pet. 6-8, 15-19).

The transcript of the committee session of March 1, 1947, revealed that following petitioner's testimony the committee went into executive session for 15 minutes, from 5:00 to 5:15, to discuss the program for the following day (Govt. Ex. 5, p. 2100).

Petitioner sought by subpoena duces tecum to obtain the Minutes Book of the Committee for the 80th Congress which covered March 1, 1947, the day of petitioner's allegedly perjurious testimony (R. 488). The purpose was to offer in evidence the minutes, if any, of the executive session of the committee held just after his testimony to show how many members of the Committee were then present (R. 483, 488).

A subpoena duces tecum was issued to Congressman Lesinski, then Chairman of the Committee, for the production of the Minutes Book. He appeared without the book and explained to the court that it was not in his custody, but in that of the Clerk of the House of

Representatives, Mr. Ralph R. Roberts (R. 482-488).[4]

A subpoena duces tecum was thereafter served on Mr. Roberts who also appeared without the book (R. 923-924). He stated that he had custody of the book but had no authority to produce it. He explained that he had brought the subpoena to the attention of the House of Representatives which had, by passing House Resolution 465, 81st Cong., 2d sess., referred the matter to the Judiciary Committee for study and investigation (R. 924-926). He further testified that the minutes of the executive sessions and the open sessions of the committee were all contained in the same book (R. 928, 932), and a certified copy of the pages of the book containing the minutes of the open sessions was tendered petitioner (R. 931). The court asked Mr. Roberts to inform the Chairman of the Judiciary Committee that in its opinion the case could not proceed to final determination until the Minutes were produced, and that prompt action should be taken (R. 932-933).

Thereafter Mr. Roberts again appeared without the Minutes Book (R. 1048) and presented a Resolution of the House of Representatives[5] which, inter alia, recited that

> * * * nothing occurred of sufficient importance in the executive session of said Committee on Education and Labor on the afternoon of March 1, 1947, to justify the entry of a minute of said meeting and no minutes of said executive meeting were made; * * *

4/ Subsequently, when Congressman Lesinski was again on the stand, he offered to obtain the book and permit petitioner's counsel to examine it in the Chairman's office (R. 1042).

5/ H. Res. 469, 81st Cong., 2d sess., Govt. Ex. 19. The Resolution was received in evidence (R. 1057; Govt. Ex. 19).

and authorized the clerk to appear without the Minutes Book but to produce certified copies of the minutes of the committee's open session.[6/] Mr. Roberts testified that the Minutes Book did not contain any minutes of the March 1, 1947 executive session of the committee (R. 1051-1052). Congressman Hoffman also testified that the Minutes Book did not contain minutes of that executive session (R. 1297). The committee room was not even cleared for this executive session (R. 1327) since no business of importance transpired (R. 1057). Consequently, no minutes were kept (Govt. Ex. 19; R. 1051-1052, 1296-1297).

Petitioner did not make any effort to contradict by evidence the recital of the House Resolution or the testimony of Mr. Roberts and Congressman Hoffman that there were no minutes of the executive session of March 1, 1947, despite the fact that the Chairman of the Committee, Congressman Lesinski, had offered to permit petitioner's counsel to examine the entire Minutes Book (R. 1042). After receiving the resolution and testimony that no minutes were made of the executive session of March 1, 1947, the trial court did not insist on production of the Minutes Book, stating that "the record is complete on that" (R. 1332).

As the Court of Appeals pointed out, the resolution of the House and the testimony of Hoffman and Roberts were clearly sufficient proof of the lack of record under Rule 44, F. R. Civ. P. made applicable to criminal cases by Rule 27, F. R. Crim. P. Failure to require production of a nonexistent record obviously does not constitute grounds

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6/ These photostatic copies of the pages of the Minutes Book covering the open sessions were admitted in evidence (R. 1050, 1060).

for reversal.[1/]

3. Petitioner's contention that it was error to admit in evidence at the second trial a transcript of the testimony given at the first trial by Congressman Thomas L. Owens who had died in the interim (Pet. 26-27) was adequately answered by the Court of Appeals (R. 1712-1714, 1742-1743). Even if it be thought that the issues in the two cases were different and that petitioner was not accorded an opportunity to cross-examine Mr. Owens at the first trial as to his presence at the essential times, the testimony of four congressmen at the second trial as to Owens' presence at the essential times was far more specific and definite than that of Owens himself (see R. 296, 310, 336, 361-362, 397). Consequently, the admission of the transcript of Owens' testimony could not have been prejudicial.

4. Petitioner's further contention that the giving of perjurious testimony before a congressional committee in the District of Columbia does not constitute a violation of the local District of Columbia perjury statute was thoroughly briefed and argued to this Court in the first Christoffel case (see Govt. Br. No. 528, 1948 Term, pp. 28-32). The Court did not then think it meritorious, and the issue is presented here in exactly the same posture as it was there.

1/ Petitioner argues that the trial court did not conclude that the desired minutes did not exist, but rather that it could not require their production. This is refuted by the record. Prior to the showing that the minutes did not exist the trial court stated that "the case cannot proceed to a final determination unless these records are produced" (R. 933). Subsequently, after the House Resolution and testimony referred to above, the court said "I think the record is complete on that" (R. 1332). Thus, it is apparent that the judge concluded that it had been adequately established that the desired minutes did not exist.

CONCLUSION

The questions presented turn upon the evidence and rulings upon evidence peculiar to this case. The issues are not of general interest. For these reasons and for the reasons hitherto stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1953.

No. 341, Misc. CHRISTOFFEL *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. *Per Curiam:* The petition for writ of certiorari is granted. The judgment of the Court of Appeals is vacated and the case is remanded to the United States District Court for the District of Columbia for resentencing under 18 U. S. C. (1946 ed.) § 231. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *David Rein* and *Arthur Kinoy* for petitioner. *Solicitor General Cummings, Beatrice Rosenberg* and *Murry Lee Randall* for the United States. Reported below: 91 U. S. App. D. C. 241, 200 F. 2d 734.